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No. 88-626

In the Supreme Court of the United States

OCTOBER TERM, 1988

THE GOODYEAR TIRE & RUBBER COMPANY,
Petitioner,

vs.

DALE L. HODDER,
Respondent.

OBJECTION OF RESPONDENT TO THE MOTION OF THE MOTOR VEHICLE MANUFACTURERS ASSOCIATION OF THE UNITED STATES, INC., PRODUCT LIABILITY ADVISORY COUNCIL, INC., AND NATIONAL ASSOCIATION OF MANUFACTURERS OF THE UNITED STATES OF AMERICA FOR LEAVE TO FILE BRIEF AS AMICI CURIAE IN SUPPORT OF THE PETITION

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Hodder v. The Goodyear Tire & Rubber Company, 426 N.W.2d 826 (Minn. 1988), *reh'g denied* (July 25, 1988) 6

In Re: A. H. Robins Company, Inc., 85 B.R. 373 (S.D. Va. 1988) 2

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Rule

Supreme Court Rule 36.3 ..... 1, 6

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The motion of *amici curiae* fails to set forth facts or questions of law that have not been presented or reasons for believing that they will not be adequately presented by the parties as required by United States Supreme Court Rule 36.3. Since Goodyear is a major product manufacturer and a long standing member of the National Association of Manufacturers, *amicus* herein, there is no reason to believe that Goodyear is not competent to argue whatever facts and law that may be asserted by *amici curiae*.

The motion and brief of *amici curiae* is nothing more than a self-serving attempt to constrain the exercise of vital state interests for the economic benefit of manufacturers purportedly to serve the "health and comfort of the consuming public." It makes sweeping and unsupported statements about the impact of punitive damages on American industry, while ignoring the justification for those damages and the acts upon which they are based. *Amici curiae* support the conduct of Johns-Manville Corporation and A. H. Robins Company while casting a blind eye on the thousands of deaths and serious injuries caused by their willful and wanton misconduct, not to mention the billions of dollars expended to correct their misdeeds.[1] Yet, despite the death and ruin left in the wake of their misconduct, Johns-Manville and A. H. Robins continue as profitable corporate operations.[2]

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1. One study estimated that 350,000 deaths and 200,000 to 300,000 injuries with significant impairment or disability will result from exposure to asbestos fibers. It is also estimated that tens of thousands of women have been seriously injured or killed by the Dalkon Shield. Page, *Asbestos and the Dalkon Shield: Corporate America on Trial*, 85 Mich. L. Rev. 1324 (1987).

2. Both Johns-Manville and A. H. Robins remain in business, having reorganized under Chapter 11 bankruptcies. Contrary to the assertions of *amici curiae*, these bankruptcies were not caused by the award or threat of punitive damages alone. Both companies estimated their total future liability based primarily on their exposure to compensatory damages, the legitimacy of which is not at issue here. *See McArthur v. Johns-Manville Corporation*, 837 F.2d 89, 90 (2nd Cir. 1988); *Hansen v. Johns-Manville Products Corp.*, 734 F.2d 1036, 1041 (5th Cir. 1984); *In Re: A. H. Robins Company, Inc.*, 85 B.R. 373, 376 (S.D. Va. 1988). In fact, in both reorganizations, the courts refused asbestos and Dalkon-Shield claimants' recovery of punitive damages. *In Re: Johns-Manville Corporation*, 68 B.R. 618 (S.D.N.Y. 1986), *aff'd sub nom., Kane v. Johns-Manville Corporation*, 843 F.2d 636 (2nd Cir. 1988); *In Re: A. H. Robins Company, Inc.*, 89 B.R. 555, 562, 563 (S.D. Va. 1988). While in reorganization, the financial health of A. H. Robins Company has improved substantially. *In Re: A. H. Robins Company, Inc.*, 88 B.R. 742, 748 (S.D. Va. 1988).

The egregiousness of their conduct, however, cannot be ignored in assessing the appropriateness of punitive damages. It is a well known fact that both companies, like Goodyear, were long aware that their products caused serious injury and death to their customers. Page, *Asbestos and the Dalkon-Shield: Corporate America on Trial*, 85 Mich. L. Rev. 1324, 1326 (1987); Note, *Strategic Bankruptcies: Class Actions, Classification & The Dalkon-Shield Cases*, 7 Cardozo L. Rev. pp. 817, 820, 821 (1986). After sale of the products and discovery of the harm they were causing, neither company took action to remedy the situation until forced to do so by the civil justice system. Even an authority relied upon by *amici curiae* acknowledges the "clear evidence" of A. H. Robins' "corporate irresponsibility." Connell, *The Crisis in Contraception*, May/June 1987, Technology Review 47, 51. In the face of these tragedies *amici curiae* cannot legitimately argue that the fate of Johns-Manville and A. H. Robins detracts from the "health and comfort" of the public, nor legitimately criticize the forced removal of products such as asbestos, the Dalkon-Shield and Bendectin from the market.[3]

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3. Bendectin was an anti-nausea medication prescribed for pregnant women. It was found that there was a high incidence of infants born without hands, arms, feet and even legs to Bendectin mothers. The manufacturer denied and continues to deny any causal connection between Bendectin and these severe birth defects. However, the jury in *Ealy v. Richardson-Merrell, Inc.*, 56 U.S.L.W. 2232 (E.D.D.C. 1987), found such a causal connection. While the jury's compensatory award of $20 million was upheld, the District Court remitted the punitive damage award to zero. Although it is unknown whether the withdrawal of Bendectin was done for the good of society or because it became too expensive to manufacture, it is certain that the withdrawal did not come as the result of punitive damage awards as *amici curiae* suggests. The final example given by *amici curiae* relates to the swine flu fiasco. The

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Amici curiae's erroneous assertion of a punitive damage explosion is akin to "falsely shouting fire in a theatre and causing a panic." *Schenck v. United States*, 249 U.S. 47, 52 (1919). The "panic" *amici curiae* seek to portray is unfounded. Comprehensive studies have indicated that punitive damage awards are rare in product liability cases. In a survey conducted on product liability cases decided by state and federal appellate courts between December, 1984 and December, 1985, it was found that punitive damages were allowed in only two percent of those cases. Landes & Posner, *New Light on Punitive Damages*, Regulation, 33-36 (1986). Because the survey sample was limited to appellate cases, the two percent frequency rate is likely overstated. *Id.* at 35. The study of the Rand Corporation's Institute For Civil Justice, relied upon by *amici curiae*, supports this conclusion. The study found that "punitive damage awards appear to be more frequent in asbestos cases than in product liability cases generally, but they were still rare. The Institute For Civil Justice, *An Overview of the First Five Program Years, April, 1980 - March, 1985*, at 57. The study concluded that punitive damages were awarded in "less than one percent of the claims closed during the study period." *Id.* Rand also concluded, contrary to the assertion of *amici curiae*, that "[j]uries did not seem to distinguish between corporations and individuals in reaching decisions about liability." *Id.* at 27.

Footnote continued—

fact that manufacturers refused to supply the influenza vaccine until Congress enacted legislation giving them immunity from liability has nothing to do with any civil award of punitive damages. The claims for death and paralysis, largely from Guillain-Barre syndrome related to the vaccine, were all made against the United States government but only for compensatory damages.

In 1986, the American Bar Foundation reported that, "punitive damages were not often awarded in product liability or medical malpractice cases. In fact, it was relatively rare for plaintiffs to win any kind of award in those two areas." Daniels, *Punitive Damages: The Real Story*, A.B.A.J., 60, 61 (Aug. 1, 1986). The situation in Minnesota is no different. In evaluation of jury verdicts rendered between January 1, 1982 through June 30, 1987, the Minnesota Justice Foundation found that "there has been no substantial increase in the number of cases filed, the percentage of plaintiff verdicts or the average amount of dollars awarded by Minnesota juries. . .". Minnesota Justice Foundation, *Minnesota Jury Verdicts, 1982-1987*, at 5 (1988). The survey concluded that "substantial increases in liability insurance premiums between 1982 and 1987 were not caused by any general increase in the number of cases filed, the percentage of plaintiffs' verdicts, or the size of Minnesota jury awards during the same period." *Id.* at 12.

Amici curiae claim that punitive damage awards increase the cost of manufactured goods because of high insurance premiums and conversely that punitive damage limits would lower those costs. Insurance industry studies, however, have indicated that punitive damage restrictions have no impact in reducing product liability insurance premiums. *See Claim Evaluation Project, National Overview*, Hamilton, Rebinovitz & Alschuler, Inc., 40-42, 62-64, 77-78 (1987).

Goodyear itself does not suggest to the Court a formula for punitive damages in products cases and now concedes that it is not attacking the constitutionality of the Minnesota Punitive Damage Statute. Petitioner's

Reply Memorandum at 5. *Amici curiae* urge the adoption of a standard which as a proper deterrent would require that the punishment "equal any wrongful gain that [the manufacturer] would otherwise expect to obtain from the wrongful conduct. . . . Any other punishment will either overdeter or underdeter [sic]." *Amici* Brief at 16. This was precisely the standard argued by counsel for Hodder at the trial. The court below took a more conservative view, affirming the judgment for a reduced amount. *Hodder v. The Goodyear Tire & Rubber Company*, 426 N.W.2d 826, 841 (Minn. 1988), *reh'g denied* (July 25, 1988).

CONCLUSION

The motion of *amici curiae* for leave to file a brief in support of Goodyear's Petition for Writ of Certiorari should be denied for its noncompliance with United States Supreme Court Rule 36.3. The motion does not set forth facts or reasons for believing that they will not adequately be presented by the parties. To the limited extent the brief of *amici curiae* discusses this case, the arguments are repetitive of those made by Goodyear. The sweeping and unsupported attack on punitive damages generally proves that *amici curiae* seek to use this case as a forum to assert their special interests while overlooking the specific safeguards afforded by the Minnesota legislature and courts and Goodyear's conceded procedural failures. For these reasons, Respondent Dale L. Hodder asks this Court for denial of the Motion of the Motor Vehicle Manufacturer's Association of the United States, Inc., Product Liability Advisory Council, Inc., and National Association of Manufacturers of the

United States of America for Leave to File Brief as *Amici Curiae* in Support of the Petition. Respondent Hodder asks the Court to deny the Petition of The Goodyear Tire & Rubber Company for Writ of Certiorari to the Supreme Court of Minnesota.

Respectfully submitted,

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